

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CHRISTOPHER A. JONES

Plaintiff,

v.

HOWARD SKOLNIK, *et al.*,

Defendants.

3:10-cv-00162-LRH-VPC

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

February 27, 2012

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion to dismiss (#39).¹ Plaintiff opposed (#48) and defendants replied (#50). Based on the court's thorough review of the motions and record, it recommends that defendants' motion to dismiss (#39) be granted in part and denied in part.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Christopher A. Jones ("plaintiff"), a *pro se* inmate, is currently incarcerated at Southern Desert Correctional Center ("SDCC") in the custody of the Nevada Department of Corrections ("NDOC") (#56). Plaintiff filed his original complaint in state court, and defendants removed to federal court (#1). Plaintiff brings his first amended complaint pursuant to 42 U.S.C. § 1983, alleging a Fourteenth Amendment due process claim, an Eighth Amendment excessive force claim, a First Amendment retaliation claim, and a Fourteenth Amendment due process claim based on false charges (#16). The court screened plaintiff's first amended complaint pursuant to 28 U.S.C. § 1915A and allowed certain claims to proceed (#15).² Correctional Sergeant Yaquub Mustafaa, and

¹ Refers to the court's docket number.

² The court allowed the following claims to proceed: Count I Fourteenth Amendment due process claim against defendant Mustafaa; Count III First Amendment retaliation claim against defendant

1 Correctional Officers Taerik Berry, and Kenneth Thackwell (“defendants”) bring the instant motion
2 (#39).

3 The claims which are the subject of this motion are: (1) Count I - Fourteenth Amendment
4 claim against defendant Mustafaa for refusing plaintiff’s request for an inmate witness at plaintiff’s
5 disciplinary hearing; (2) Count III - Eighth Amendment excessive force claim against defendant
6 Berry; and (3) Count IV - due process claim against defendants Thackwell and Berry. *Id.*

7 In count I, plaintiff alleges that defendant Mustafaa violated his Fourteenth Amendment right
8 to due process when he refused plaintiff’s request for an inmate witness at plaintiff’s disciplinary
9 hearing (#16, p. 7). NDOC found plaintiff guilty of MJ-2 assault and plaintiff lost three-hundred-
10 and-sixty-five days of statutory good-time credits. *Id.* at 25; 16-3, p. 5. In count III, plaintiff alleges
11 that defendant Berry used excessive force against plaintiff, in violation of the Eighth Amendment
12 (#16, p. 13). In count IV, plaintiff alleges that defendants Thackwell and Berry violated plaintiff’s
13 due process rights when they filed false charges against him in order to cover up their own
14 wrongdoing. *Id.* at 36. Plaintiff filed his civil rights complaint on February 4, 2010 (#1-1).

15 On October 20, 2011, this court issued an order recommending that defendants’ motion to
16 dismiss based on the state of limitations be denied on the ground that defendants failed to submit
17 authenticated evidence to prove that plaintiff’s claims were time-barred and relied only on exhibits
18 attached to plaintiff’s complaint (#67). On October 25, 2011, defendants filed objections to the order
19 (#69).³ On January 12, 2012, District Judge Larry R. Hicks sustained defendants’ partial objections
20 and referred the motion to this court for reconsideration (#97). In its order, the District Court
21 determined that defendants may rely on exhibits attached to plaintiff’s amended complaint because
22 “a copy of a written instrument that is an exhibit to a pleading is a part of the pleadings for all
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24 Schultz; Count III Eighth Amendment Excessive Force claim against defendants Berry, Schultz, and Landis;
25 Count IV Fourteenth Amendment due process claim against defendants Thackwell and Berry; and Count V
26 Fourteenth Amendment due process claim against defendants Mason and Traut. The court dismissed the
27 following defendants with prejudice: Brian Williams, James G. Cox, Howard Skolnik, E.K. McDaniel, and
Shell Zappitini (#15). Plaintiff’s amended complaint which was entered after screening is docket number
16 (#16).

³ Plaintiff filed a response to defendants’ objections (#78).

1 purposes.” *Id.*; Fed.R.Civ.P. 10(c). In light of the District Court’s order, the court reconsiders
2 whether defendants’ motion to dismiss should be granted based on the statute of limitations.

3 Defendants move to dismiss and maintain that count I, the excessive force claim in count III
4 against defendant Berry, and count IV are time-barred by the statute of limitations (#39). Defendants
5 claim that plaintiff exhausted his administrative remedies and had notice of the denial of his
6 grievance for count I in October 2007, and for counts III and IV in September 2007. *Id.* at 4.⁴

7 Plaintiff opposes and asserts that the statute of limitations “was tolled as to all of the
8 intertwined charges” and “did not accrue until the conviction or sentence [wa]s reversed, expunged,
9 invalidated or impunged by the grant of a writ of habeas corpus” (#48, p. 5) (citing *Heck v.*
10 *Humphrey*, 512 U.S. 477 (1994)). The Seventh Judicial District Court of the State of Nevada
11 granted plaintiff’s habeas petition on September 3, 2009, and restored the good-time credits forfeited
12 in plaintiff’s prison disciplinary proceeding (#16-5, p. 7).

13 Defendants reply that plaintiff’s three claims are not intertwined and that plaintiff’s claims
14 in count III alleging excessive force are independent of his due process claims in counts I and IV
15 (#50, p. 2). Defendants argue that *Heck v. Humphrey* does not apply to toll the statute of limitations
16 in count I because a favorable finding that defendant Mustafaa denied plaintiff’s request for a witness
17 would not necessarily imply the invalidity of the judgement obtained at the disciplinary hearing. *Id.*
18 at 4. Defendants state that *Heck* does not apply to toll the statute of limitations in count III because
19 a favorable finding in plaintiff’s Eight Amendment claim would not imply the invalidity of the fact
20 or length of his confinement. *Id.* at 3. Lastly, defendants assert that *Heck* does not apply to toll the
21 statute of limitations in count IV because the habeas order did not discuss any alleged due process
22 violations against defendants Berry or Thackwell. *Id.* at 2.

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27 ⁴ Defendants cite to the exhibits to plaintiff’s original complaint (#1-1). The court affixed
these exhibits to plaintiff’s amended complaint in docket 16. The court cites to the exhibits affixed to
plaintiff’s amended complaint (#16).

II. DISCUSSION & ANALYSIS

A. Discussion

1. Motion to Dismiss

"A dismissal under Fed. R. Civ. P. 12(b)(6) is essentially a ruling on a question of law." *North Star Int'l v. Ariz. Corp. Comm.*, 720 F.2d 578, 580 (9th Cir. 1983) (citation omitted). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not contain detailed factual allegations, but it must contain more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. The Rule 8(a) notice pleading standard requires the plaintiff to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Id.* (internal quotations and citation omitted). The "plausibility standard" does not impose a "probability requirement," rather, it requires a complaint to contain "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.*

When considering a motion to dismiss for failure to state a claim upon which relief can be granted, the court employs a two-pronged approach. *Iqbal*, 129 S.Ct. at 1955. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Id.* at 1949. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 1950. In other words, for the nonmovant to succeed, "the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Thus, a complaint may be dismissed as a matter of law for "(1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim." *Smilecare Dental Grp. v. Delta Dental Plan*, 88 F.3d 780, 783 (9th Cir. 1996) (quoting *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984)).

1 Under section 1983, a plaintiff must allege that (1) defendants subjected him to the
 2 deprivation of a right, privilege, or immunity guaranteed by the U.S. Constitution or federal law, and
 3 (2) that the defendants acted under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988);
 4 *see also Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

5 A *pro se* plaintiff's complaint must be construed liberally and can only be dismissed with
 6 prejudice where it appears certain that the plaintiff would not be entitled to relief. *Ortez v.*
 7 *Washington Cnty., State of Or.*, 88 F.3d 804, 807 (9th Cir. 1996). Although allegations of a *pro se*
 8 complaint are held to a less stringent standard than formal pleadings drafted by a lawyer, *Haines v.*
 9 *Kerner*, 404 U.S. 519, 596 (1972), sweeping conclusory allegations will not suffice. *Leer v. Murphy*,
 10 844 F.2d 628, 634 (9th Cir. 1988).

11 **2. Statute of Limitations**

12 Section 1983 does not provide a statute of limitations. Federal courts apply the forum
 13 state's statute of limitations for personal injury claims. *The Comm. Concerning Cmty. Improvement*
 14 *v. City of Modesto*, 583 F.3d 690, 701 n. 4 (9th Cir. 2009). In Nevada, the statute of limitations for
 15 personal injury claims is two years. Nev. Rev. Stat. § 11.190(4)(e). On the other hand, federal law
 16 determines when a cause of action accrues and the statute of limitations begins to run for a section
 17 1983 claim. *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991). Under federal
 18 law, a cause of action accrues when the plaintiff knows or has reason to know of the injury which
 19 is the basis of the action. *Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996). Pursuant to the
 20 Prison Litigation Reform Act ("PLRA"), inmates must exhaust available administrative remedies
 21 before filing section 1983 actions in federal court. *See* 42 U.S.C. § 1997e. While an inmate
 22 completes the mandatory exhaustion process, the applicable statute of limitations is tolled. *See*
 23 *Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005); *see also Wisenbaker v. Farwell*, 341 F.Supp.2d
 24 1160, 1165 (D.Nev., 2004).

25 **B. Analysis**

26 **1. Count I - Due Process Claim Against Defendant Mustafaa**

27 In count I, plaintiff alleges that defendant Mustafaa violated his due process rights when he

1 refused to call a witness at plaintiff's disciplinary hearing (#16, p. 7). Defendants move to dismiss
2 count I and argue that plaintiff's claim is barred by the state of limitations.

3 On August 14, 2007, plaintiff submitted grievance 2006-26-41251 regarding the denial of
4 his request to call a witness at his disciplinary hearing (#16-3, p. 28). NDOC denied this grievance
5 and plaintiff submitted a first level grievance on August 1, 2007 (#16-4, pp. 1-7). Plaintiff appealed
6 to the second level on September 24, 2007, and NDOC denied his grievance. *Id.* at 11. Plaintiff
7 received notice of the denial of his second level grievance on October 30, 2007. *Id.* Pursuant to
8 Nevada's two-year statute of limitations, plaintiff was required to bring his claim in count I by
9 October 30, 2009.

10 Plaintiff argues that the statute of limitations "was tolled as to all of the intertwined charges
11 as a claim challenging the procedural aspects of a prison disciplinary hearing does not exist, is not
12 cognizable under section 1983 if the nature of the inmate's allegations are such that, if proven,
13 would necessarily imply the invalidity of the fact or length of plaintiff's confinement" (#48, p. 4).
14 Accordingly, plaintiff asserts that he was required to file his claim two years from the date his
15 habeas petition was granted on September 3, 2009. *Id.* at 5. The court agrees.

16 In *Edwards*, the Supreme Court held that prisoner procedural due process claims that
17 necessarily implicate the validity of a prison disciplinary sanction are barred unless and until the
18 disciplinary proceeding is invalidated. *Edwards v. Balisok*, 520 U.S. 641, 646 (1997). In its order,
19 the Seventh Judicial District Court of the State of Nevada found that plaintiff was not afforded due
20 process at his disciplinary hearing "when his request for a witness was denied" (#16-5, p. 8). As
21 a result of this finding, the court restored the statutory good-time credits forfeited as a result of the
22 disciplinary hearing. *Id.* at 9.

23 If plaintiff were successful in a section 1983 claim challenging his disciplinary proceeding
24 based on due process violations, expungement of the disciplinary sanction would necessarily affect
25 the duration of his confinement through reinstatement of his good-time credits. In *Heck*, the court
26 gave a concrete example of "a § 1983 action that does not seek damages directly attributable to
27 conviction or confinement but whose successful prosecution would necessarily imply that the

1 plaintiff's criminal conviction was wrongful." *Heck*, 512 U.S. at 486, n.6. Accordingly, a claim
 2 seeking damages for using the wrong procedure during a disciplinary hearing could still be subject
 3 to the limitation announced in *Heck*. Here, plaintiff alleges that defendant Mustafaa denied him the
 4 opportunity to call an identified witness at a hearing which resulted in a loss of plaintiff's good-time
 5 credits. As the court held in *Edwards*, "this is an obvious procedural defect, and state and federal
 6 courts have reinstated good-time credits (absent a new hearing) when it is established. *Edwards*,
 7 520 U.S. at 647.

8 Thus, the claim at issue did not accrue, and the statute of limitations did not start running,
 9 until the court entered judgment in plaintiff's habeas petition on September 3, 2009 (#16-5, p. 7).
 10 Pursuant to Nevada's two-year statute of limitations, plaintiff was required to file his civil rights
 11 lawsuit based on an alleged due process violation by September 3, 2011. Plaintiff filed his lawsuit
 12 on February 4, 2010, well within the two-year statute of limitations (#1-2). The court therefore
 13 concludes that count I is not barred by the statute of limitations and defendants' motion to dismiss
 14 this claim should be denied.

15 2. Count III - Excessive Force Claim Against Defendant Berry

16 In count III, plaintiff claims that defendant Berry violated his Eighth Amendment right when
 17 he used excessive force against plaintiff (#16, p. 33). Defendants move to dismiss count III and
 18 argue it is barred by the statute of limitations (#39). Plaintiff argues that the statute of limitations
 19 was tolled pursuant to *Heck v. Humphrey* (#48, p. 4). Defendants reply that plaintiff should have
 20 filed his complaint in count III by September 2009 and that "a favorable finding for plaintiff that
 21 unnecessary force was used against him . . . would not imply the invalidity of the fact or length of
 22 plaintiff's confinement" (#50, p. 3). The court agrees with defendants.

23 On June 11, 2007, plaintiff filed informal grievance 2006-26-22347 and grieved an incident
 24 of "excessive use of force" (#16-1, p. 2).⁵ NDOC denied plaintiff's informal level grievance on July
 25 10, 2007. *Id.* On July 17, 2007, plaintiff filed first level grievance 2006-26-22347, which NDOC
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27 ⁵ Plaintiff also filed grievance 2006-26-41215 regarding his claim of excessive force; however, he first exhausted his administrative remedies in grievance 2006-26-22347.

1 denied on July 27, 2007. *Id.* at 4. On August 2, 2007, plaintiff filed second level grievance 2006-
 2 26-22347, which NDOC denied on September 11, 2007. Plaintiff received notice of the denial of
 3 his second level grievance on September 24, 2007. *Id.* at 7. Pursuant to Nevada's two-year statute
 4 of limitations, plaintiff was required to file his claim regarding count III by September 24, 2009.⁶

5 NDOC found plaintiff guilty of MJ-2 assault at his disciplinary hearing (#16-3, p. 6). The
 6 *Heck* doctrine did not preclude plaintiff's § 1983 action based on excessive force because a
 7 successful excessive force claim would not necessarily call into question plaintiff's disciplinary
 8 finding of guilty and his resulting loss of good-time credits. As the court held in *Sanford v. Motts*,
 9 it is possible to find that an officer used excessive force, and not call into question the validity of
 10 a guilty finding. *See Sanford v. Motts*, 258 F.3d 1117, 1119-20 (9th Cir. 2001). Plaintiff's loss of
 11 statutory good-time credits is not automatically invalidated by a showing that defendants used
 12 excessive force against plaintiff.⁷

13 Plaintiff's claim accrued when he exhausted his administrative remedies on September 24,
 14 2007, and plaintiff was required to file his civil rights claim by September 24, 2009. Accordingly,
 15 the court recommends defendants' motion to dismiss count III based on the statute of limitations
 16 be granted and that count III be dismissed with prejudice.

17 3. Count IV - Due Process Claim Against Defendants Thackwell and Berry

18 In count IV, plaintiff alleges that defendants Berry and Thackwell violated his due process
 19 rights when they brought fraudulent charges against him (#16, p. 36). On June 11, 2007, plaintiff
 20 filed informal grievance 2006-26-22347 and claimed that SDCC staff filed false disciplinary
 21 charges against him (#16-1, p. 2). NDOC denied plaintiff's informal level grievance on July 10,
 22 2007. *Id.* On July 17, 2007, plaintiff filed first level grievance 2006-26-22347, which NDOC
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24 ⁶ Both parties refer to February 4, 2010 as the date plaintiff filed his action. Pursuant to the
 25 "prison mailbox rule," federal courts deem the filing date of a document as the date that it was given to
 26 prison officials for mailing. *Houston v. Lack*, 487 U.S. 266, 270 (1988). Plaintiff filed his complaint on
 December 1, 2009. However, even if the date of filing his complaint was December 1, 2009, plaintiff would
 still be barred by the statute of limitations.

27 ⁷ For example, it is possible that defendants used excessive force and that plaintiff assaulted
 them. Thus, a finding of excessive force would not necessarily call into question plaintiff's loss of statutory
 good-time credits.

1 denied on July 27, 2007. *Id.* at 4. On August 2, 2007, plaintiff filed second level grievance 2006-
 2 26-22347, which NDOC denied on September 11, 2007. Plaintiff received notice of the denial of
 3 his second level grievance on September 24, 2007. *Id.* at 7. Pursuant to Nevada's two-year statute
 4 of limitations, plaintiff was required to file his claim regarding count IV by September 24, 2009.

5 a. Defendant Thackwell

6 Plaintiff alleges that he was denied due process when defendant Thackwell filed fraudulent
 7 charges against him. However, plaintiff does not allege that he lost good-time credits as a result
 8 of the allegedly false charges. Plaintiff states in his complaint that the "fraudulent charges of
 9 [correctional officer] Thackwell . . . were dismissed as duplicate" (#16, p. 36).⁸ Plaintiff's claim
 10 against defendant Thackwell does not imply the invalidity of the disciplinary hearing and affect
 11 plaintiff's length of confinement because even if defendant Thackwell brought false charges against
 12 plaintiff, the hearing officer dismissed the charges. Thus, the *Heck* bar would not have applied to
 13 bar this claim. Accordingly, plaintiff was required to file his claim against defendant Thackwell
 14 by September 24, 2009, two years from the exhaustion of his administrative remedies. Because
 15 plaintiff failed to file his civil rights claim by this date, it is barred by the statute of limitations and
 16 defendants' motion to dismiss this claim against defendant Thackwell should be granted. Count
 17 IV against defendant Thackwell should be dismissed with prejudice.

18 b. Defendant Berry

19 Plaintiff alleges that defendant Berry filed fraudulent charges against plaintiff, which were
 20 not dismissed, and resulted in a loss of three-hundred-and-sixty-five days of good-time credits (#16,
 21 pp. 22, 36). If plaintiff were successful in a due process claim based on fraudulent charges, he
 22 would call into question his disciplinary hearing and the forfeiture of his good-time credits, thereby
 23 affecting his length of confinement. *See Edwards*, 520 U.S. at 646; *see also Kemp v. Skolnik*, 2012
 24 WL 366946, at *3 (D. Nev., February 3, 2012) (holding that a due process claim which resulted in
 25 a loss of good-time credits implied the invalidity of the deprivation of sentence credits, thereby
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27 ⁸ Plaintiff also states in his opposition that "defendant Mustafaa dismissed all charges, except for the MJ-2 written by defendant Berry (#48, p. 2).

1 challenging the duration of plaintiff's confinement).

2 Pursuant to the *Heck* doctrine, the statute of limitations did not run until the Nevada District
3 Court granted plaintiff's habeas petition on September 3, 2009 (#16-5, p. 7). According to
4 Nevada's two-year statute of limitations, plaintiff was required to file his civil rights lawsuit based
5 on an alleged violation of due process by September 3, 2011. Plaintiff filed his lawsuit on February
6 4, 2010, well within the two-year statute of limitations (#1-2). The court therefore concludes that
7 this claim in count IV is not barred by the statute of limitations and defendants' motion to dismiss
8 this claim should be denied.

9 **III. CONCLUSION**

10 Based on the foregoing and for good cause appearing, the court recommends that
11 defendants' motion to dismiss (#39) be granted in part and denied in part. Defendants' motion to
12 dismiss count III against defendant Berry and count IV against defendant Thackwell should be
13 granted, and these claims should be dismissed with prejudice. Defendants' motion to dismiss count
14 I and count IV against defendant Berry should be denied. The parties are advised:

15 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
16 the parties may file specific written objections to this Report and Recommendation within fourteen
17 days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
18 Recommendation" and should be accompanied by points and authorities for consideration by the
19 District Court.

20 2. This Report and Recommendation is not an appealable order and any notice of appeal
21 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

22 **IV. RECOMMENDATION**

23 **IT IS THEREFORE RECOMMENDED** that defendants' motion to dismiss (#39) be
24 granted in part and denied in part as follows:

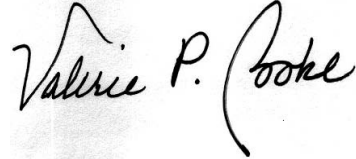
25 (1) Defendants' motion to dismiss count III against defendant Berry⁹ and count IV against
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27 ⁹ Only plaintiff's claim against defendant Berry in count III should be dismissed. Defendants do not move to dismiss count III against defendants Landis and Schultz.

1 defendant Thackwell should be **GRANTED**, and these claims should be **DISMISSED** with
2 prejudice.

3 (2) Defendants' motion to dismiss count I and count IV against defendant Berry should be
4 **DENIED**.

5 **DATED:** February 27, 2012.

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8 UNITED STATES MAGISTRATE JUDGE
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